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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-1380

JADAIR, INC.,

Plaintiff-Appellant,

v.

THE WALT KEELER COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79-C-791—Robert W. Warren, *Judge.*

SUBMITTED JANUARY 11, 1982*—DECIDED MAY 26, 1982

Before CUMMINGS, *Chief Judge*, SPRECHER** and WOOD, *Circuit Judges.*

CUMMINGS, *Chief Judge.* Jadair, Inc. ("Jadair"), a Wisconsin corporation, brought a declaratory judgment action in Wisconsin state court against the Walt Keeler Company, Inc. ("Keeler"), a Kansas corporation. Keeler removed the suit to federal court under 28 U.S.C.

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* This case was scheduled for oral argument on January 11, 1982. Owing to severe winter weather, the parties agreed to submit it on the briefs.

** Circuit Judge Robert A. Sprecher read the briefs, participated in the conference and voted to affirm. However, he died without reviewing this opinion.

§ 1441(a). Jadair challenged the removal, arguing that Keeler had failed to demonstrate an amount in controversy in excess of $10,000. In a March 1980 memorandum and order Judge Warren denied Jadair's motion to remand the case to state court. Then Keeler moved to dismiss the federal suit for lack of personal jurisdiction, and in a February 1981 memorandum and order Judge Warren granted Keeler's motion. Jadair's appeal is phrased in the alternative: the case should have been remanded; if not, the federal court should have exercised jurisdiction over Keeler. We affirm both of Judge Warren's rulings.

I

Jadair manufactures machinery for cleaning cement mixers in Port Washington, Wisconsin. In November of 1978 Keeler, which produces concrete and other building materials in Wichita, Kansas, contracted to buy a Jadair machine for $75,850. The unit was shipped to Keeler's plant, but did not perform satisfactorily. In September of 1978 Keeler sent Jadair a bill for $6,825.24 worth of electrical and hydraulic repairs to the machine. The parties were not able to resolve their differences, including who should pay this bill.

What would have been a garden-variety contract dispute became more complicated as the parties jockeyed for litigating position. Seeking a convenient forum Jadair moved first. On October 22, 1979, it asked the Circuit Court of Milwaukee County to declare it free of any liability to Keeler. Keeler countered by removing the action to federal court on November 15, 1979, apparently in hopes Wisconsin's long-arm statute would be construed more narrowly there than in a Wisconsin state court. If it were successful in having the suit dismissed, Keeler could then force Jadair either to litigate in Kansas or to wait to be sued in Wisconsin.

II

As a single defendant and non-citizen of Wisconsin, Keeler was entitled to remove the lawsuit against it from state to federal court, if the federal court could have entertained the case in the first place. 28 U.S.C. § 1441(a) and (b). That provision requires in this instance that diversity jurisdiction be properly invocable —*i.e.*, that the dispute be between citizens of different states and that the amount in controversy exceed $10,000, exclusive of interest and costs. 28 U.S.C. § 1332(a).

For purposes of this appeal, the only issue is how to evaluate, *ex ante*, the amount in controversy. Declaratory judgment and injunctive relief actions sometimes present difficult and subtle valuation problems, as *McCarty v. Amoco Pipeline Co.*, 595 F.2d 389, 391-395 (7th Cir. 1979), indicates. Here, however, Jadair sought a declaration of nonliability as to any and all Keeler claims. Therefore the amount in controversy must be what Keeler could possibly recover from Jadair. Jadair argues that Keeler's maximum recovery would be its $6,825.24 out-of-pocket expenses. In response Keeler says it has additional claims for $9,300 in consequential damages, or for rescission and restoration of the contract price. Jadair thinks we must ignore these claims because (1) Keeler never demanded either consequential damages or rescission in its negotiations with Jadair; (2) Keeler made the claims only after Jadair moved to remand the case, and the jurisdictional amount must be demonstrated at the time of Keeler's removal petition; (3) consequential damages were excluded by contractual agreement; and (4) rescission is too remote a possibility to count in the computation.

Jadair's first two objections are easily disposed of. Conduct during negotiations could conceivably create an estoppel which would preclude success on the merits,[1] but a party's prayer for relief is not legally limited to

[1] We speak theoretically and intimate no view about estoppel in this case.

amounts he would have settled for when he thought settlement was a real possibility.[2] Nor is a court obliged to rely solely on the removal petition—or on an original complaint—to test the sufficiency of the alleged jurisdictional amount. It is entitled to consider the matter when the parties raise it, as they did here by a motion to remand and the memorandum and affidavits in opposition thereto. Exactly this procedure was followed by the district court, without demur by this Court, in *McCarty*, *supra*, 595 F.2d at 391.

Jadair's third argument involves the application of the Uniform Commercial Code, as enacted in Wisconsin and Kansas.[3] The contract limited damages to the costs of repair or replacement, but that provision may not be enforceable if "circumstances cause [the] exclusive or limited remedy to fail of its essential purpose." UCC § 2-719(2). Whether the repair efforts were futile enough to activate section 2-719(2) is a factual question not yet capable of resolution, but it is at least not impossible that Keeler could recover both its direct and consequential damages, which together amount to more than $14,500.

Like the district judge, we need not reach Keeler's claim for rescission and Jadair's argument against it,

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[2] Jadair throughout its brief treats this case as if Keeler were the plaintiff and had sought $6,825.24 in state court, voluntarily dismissed its suit, and then brought it in federal court with an inexplicably inflated prayer for relief. Only if Keeler's position is so misconstrued is *Arnold v. Troccoli*, 344 F.2d 842 (2d Cir. 1965), comparable. Jadair Br. 15-17. Here the change from a negotiating to a litigating posture is sufficient to explain Keeler's changed demands.

[3] The choice-of-law issue is cloudy. Jadair Br. 19, n. 3, argues that Kansas law would govern under Wisconsin choice-of-law rules. But Keeler Br. 9 states that the contract had a choice-of-law provision calling for the application of Wisconsin law. Apart from a possibly more conservative judicial construction of Section 2-719(2) in Kansas (Jadair Br. 23-25), it is immaterial because both states have enacted the Code. But see note 7 *infra*.

because the jurisdictional hurdle is surmounted by Keeler's showing on direct and consequential damages. We note, however, that the rescission claim too is grounded on the Uniform Commercial Code[4] and requires factual development. Keeler's right to rescind is not contingent, however, nor is its value necessarily less than $10,000.[5]

III

Having established that the district court had subject-matter jurisdiction, we turn to the issue of personal jurisdiction. The Wisconsin long-arm statute, made applicable in federal diversity cases by Rules 4(e) and 4(d)(7) of the Federal Rules of Civil Procedure, contemplates jurisdiction over an out-of-state defendant if the action "[r]elates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on the defendant's order or direction." Wis. Stat. Ann. 1977, § 801.05(5)(d). But there are constitutional limits on the reach of the Wisconsin statute.[6]

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[4] White and Summers, Handbook of the Law under the Uniform Commercial Code (2d ed. 1980), 295, n. 2, assume that the Code's revocation provision (Section 2-608) replaces common-law rescission unless there is an allegation of fraud.

[5] Thus the right to revoke is not comparable to the possibility of receiving future disability payments under an insurance contract. The analogy is drawn at Jadair Br. 18. The value of the right to rescind is a more difficult question. The parties have assumed that it is equal to the contract price ($75,850), but Keeler would have to return the machine if it got its money back. On the other hand, the jurisdictional amount does not ordinarily have to reflect counterclaims or offsets; it is not a net figure.

[6] Jadair assumes (Br. 29-30) that these constitutional limits are really just ill-masked policy determinations by federal courts. The line of Supreme Court precedent, stretching from *Pennoyer v. Neff*, 95 U.S. 714, to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, suggests otherwise. Furthermore, Jadair's hostility to policy determinations is only intermittent: in its argument in favor of a remand, it invites us to note proposals to raise the jurisdictional amount in diversity cases to $25,000 and to find in its favor because federal courts should not be "clogged" with diversity suits (Br. 12-14).

The Supreme Court's most recent statement of those limits is as follows:

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State.[7] Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. * * * The Due Process Clause, by ensuring the "orderly administration of the laws," * * * gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit.
>
> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297.

This case presents us with a defendant whose only connection with Wisconsin was ordering a machine from a manufacturer headquartered there. Keeler personnel never visited Jadair's plant or negotiated with Jadair in Wisconsin. All face-to-face meetings between Keeler and Jadair occurred in Wichita. The contract was agreed on and executed there. The telephone calls and letters which Jadair claims have jurisdictional significance are not, as Jadair hints, separate contacts. They are all attempts by Keeler to get Jadair to repair the malfunctioning machine. If selling the machine to a Kansas buyer is not sufficient to warrant bringing him into a Wisconsin court, Keeler's later efforts to get the machine to work properly cannot add anything to the calculations.[8]

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[7] Or, in the circumstances here, that a product will be manufactured in the forum state.

[8] In some circumstances an explicit choice-of-law provision in the contract might be relevant to the defendant's reasonable expectation of suit in the forum whose law is chosen. Here, however, neither party relies on the contract's choice-of-law provision; indeed Jadair hopes to have the substantive law of Kansas applied. See note 3 *supra*. Accordingly we give the provision no weight as a forum contact.

We are presented therefore with a case that is entirely governed by *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 597 F.2d 596 (7th Cir. 1979), certiorari denied, 445 U.S. 907. There, as here, we could assume that the buyer believed the seller would perform in Wisconsin, 597 F.2d at 603. There, unlike here, the buyer had sent the purchase order to Wisconsin, *id.* at 604. There, and *a fortiori* here, the dearth of contacts made it unfair to require the out-of-state buyer to defend in a Wisconsin court. As the *Lakeside* court remarked, citing *Hanson v. Denckla*, 357 U.S. 235, 253, "[t]he unilateral activity of [one] who claim[s] some relationship with a nonresident defendant * * * cannot satisfy the requirement of contact with a forum State." 597 F.2d at 603. *Accord, Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981).

Recognizing the importance of *Lakeside*, Jadair attacks it as a return to the old-fashioned territorialism of *Pennoyer v. Neff*, 95 U.S. 714, and notes law review commentary critical of its reasoning.[9] We think the inflexibility of *Lakeside* has been exaggerated.[10] The case is a sound attempt to define the limits of long-arm jurisdiction in commercial contexts. Assuming that long-arm jurisdiction has some such limits, surely the defendant whose sole contact with a state is that his seller's

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[9] See Jadair Br. 31-39, 42-43.

[10] Thus in *Biltmoor Moving & Storage Co. v. Shell Oil Co.*, 606 F.2d 202 (7th Cir. 1979), we allowed Illinois to assert jurisdiction in a dispute between Texas and Missouri moving companies. The decisive contact with Illinois was that the entity to be moved was Shell Oil Company's research laboratory in Wood River, Illinois. And in *Wisconsin Electrical Manufacturing Co., Inc. v. Pennant Products, Inc.*, 619 F.2d 676 (7th Cir. 1980), we upheld Wisconsin jurisdiction over a New York corporation on the basis of two visits to Wisconsin, each of which was of major importance to the negotiation of the contract.

place of business is located there is entitled to invoke them.[11]

The judgment appealed from is affirmed. Costs to appellee.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[11] *Cf.* Comment, *Constitutional Limits on State Long Arm Jurisdiction*, 49 U. Chi. L. Rev. 156, 174-177 (1982). The author suggests that the Commerce Clause reinforces the Due Process Clause and serves as an independent restraint on long-arm jurisdiction in some circumstances. The analysis there would support the result, though not necessarily the rationale, in *Lakeside*.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

JADAIR, INC.,

Plaintiff,

vs. Case No. 79-C-971

THE WALT KEELER COMPANY, INC., Entered February 23, 1981

Defendant.

MEMORANDUM AND ORDER

The plaintiff in this action is Jadair, Inc., a Wisconsin corporation which manufactures Redi-Wash equipment at its plant in Port Washington, Wisconsin. A Redi-Wash machine is a device used to clean out cement trucks after they have hauled a load of cement. The defendant, The Walt

Keeler Co., is a Kansas corporation which purchased a Redi-Wash machine from plaintiff. The plaintiff brought this action seeking a declaratory judgment that it is not indebted to the defendant for any damage due to difficulties defendant experienced with plaintiff's machine. The defendant has filed a motion to dismiss for lack of personal jurisdiction. After substantial discovery on the issue, the plaintiff responded and the issue is now ripe for resolution.

The following facts are undisputed. On October 25, 1978, plaintiff's sales manager, William Sarring, met with defendant's president, Earl Callison, at defendant's facility in Wichita, Kansas to discuss the selling of a Redi-Wash machine to defendant.

During this meeting, Mr. Sarring informed Mr. Callison that if Walt Keeler purchased a Redi-Wash machine, it would be produced at the Jadair facility in Port Washington, Wisconsin and that was the only place where the machine could be built.

On November 1, 1978, the parties entered into a contract for the purchase and sale of a Redi-Wash machine. The contract was signed at defendant's facilities in Wichita, Kansas. It provided for the purchase of one Redi-Wash machine F.O.B. seller's plant, Port Washington, Wisconsin.

Defendant's officers and employees never came to Wisconsin in connection with this purchase. Furthermore, defendant has no offices, bank accounts or listing in Wisconsin and transacts

no business in the state.

Wisconsin Statutes section 801.05(5)(d) provides that the courts of the state have jurisdiction over a person in any action which:

> (d) Relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction.

This provision of the Wisconsin long-arm statute is, however, subject to the caveat that the legislature intended that the statute would "reach only so far as permitted by the due process clause of the Fourteenth Amendment to the United States Constitution and no further." Lakeside Bridge & Steel v. Mountain State Construction Co., 597 F.2d 596, 599 (7th Cir. 1979) citing Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis.2d 459, 129 N.W.2d 237

(1964). Therefore, in interpreting the statute, the Court must determine whether the defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). This standard must be applied on a case-by-case basis. Id.

Recently, the seventh circuit has demonstrated how enigmatic the concept of personal jurisdiction is given the various factors the courts must consider. In Lakeside Bridge Steel v. Mountain State Construction, the court held that a foreign corporation was not subject to jurisdiction in Wisconsin when the sole basis for the assertion

of jurisdiction was the unilateral activity of the resident plaintiff. 597 F.2d at 603. In reaching its decision, the court applied the factors set out in The Restatement (Second) of Conflict of Laws, § 37 comment a. Comment a states that when an out-of-state

> act may not have been done with the intention of causing effects in the state but could reasonably have been expected to do so [the state's power to exercise judicial jurisdiction] depends upon a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff-the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the state on the particular cause of action.

Because the defendant in Lakeside had no other contacts with Wisconsin and because the activity it caused in Wisconsin - the production of goods - was not highly dangerous, the court held that it lacked significant contact with Wisconsin to subject it to jurisdiction in the state. The court, however, expressly declined to decide if the result would be different had the contract specifically required production in Wisconsin or if the nature of the plaintiff's contractual obligations made performance in the forum state necessary. Id. at 603 n.13. The seventh circuit in ruling as it did in Lakeside Bridge & Steel aligned itself with a number of other circuits that have held that performance of a contract in the forum state

by plaintiff is not enough by itself to establish jurisdiction over a non-resident defendant without any other contacts with the forum state. Id. at 601 and cases cited therein.

Many read the seventh circuit's decision in Lakeside as a retrenchment by the court on the issue of personal jurisdiction. Yet, a few months after Lakeside, the court distinguished its Lakeside opinion in holding that personal jurisdiction did exist over a non-resident defendant whose officers had made two trips to Wisconsin for purposes related to the contracts. Wisconsin Electric Manufacturing Co. v. Pennant Products, 619 F.2d 676 (7th Cir. 1980). The court found that the two visits to Wisconsin by officials of Pennant Products were significant

to the formation and performance of the contract and thus defendant had conducted avtivities [sic] in the forum state sufficient to satisfy due process. Id. at 678. Absent these two contacts, the defendant lacked any connection with the state.

The decision in Pennant Products appeared to cast doubt on the reasoning of the Lakeside court because the seventh circuit failed to explain why face-to-face negotiations in Wisconsin differed from negotiations by mail or phone with regard to the issue of jurisdiction. This is especially true given the court's expressed disavowal that it was deciding the issue based on the defendant's presence in the state. 619 F.2d at 678 n.8.

The seventh circuit further muddled the issue in its most recent opinion in Koster v. Automark Industries, Inc., No. 80-1765 slip op. (7th Cir. Feb. 3, 1981). There the court cited with approval and expressly relied on its opinion in Lakeside to hold that a corporation which had done business with a citizen of the Netherlands, but not in the Netherlands, was not amenable to jurisdiction in the Netherlands. In further explaining the Lakeside opinion, the court noted that it assumed that the defendant in Lakeside believed the contract would be performed in Wisconsin. Slip Op. at 4. This, however, was not enough for a successful assertion of jurisdiction under the circumstances.

In light of the Koster case, the Court finds that the reasoning in Lakeside has continuing viability. Furthermore, the Court finds that under the reasoning of Lakeside, defendant does not have sufficient contacts with the state of Wisconsin to subject it to the jurisdiction of the state without violating due process. As stated earlier, defendant had no other contacts with Wisconsin, its officials never came into the state, and the contract did not require that the plaintiff perform a particularly dangerous activity in the state. Furthermore, contrary to plaintiff's suggestion, that the defendant knew the contract would be performed in Wisconsin is not a significant factor. Koster v. Automark Industries, Inc.,

Slip Op. at 4. The contract itself did not require performance in Wisconsin, nor did the nature of plaintiff's performance make performance in the state a necessity. That the only plant that could produce the product was located in Wisconsin did not make performance necessary in Wisconsin. It did, however, make it inevitable.

Finally, the Court concurs with the practical reasoning of the first circuit in Whittaker Corporation v. United Aircraft Corporation, 482 F.2d 1079, 1085 (1st Cir. 1973) that the "interest of the forum [state] in not discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts undercuts an expansive

interpretation" of Wisconsin's long-arm statute.

On the basis of the foregoing, the Court finds that the defendant's motion to dismiss for lack of personal jurisdiction must be and is hereby granted.

SO ORDERED this 23rd day of February, 1981, at Milwaukee, Wisconsin.

/s/ Rogert W. Warren
UNITED STATES DISTRICT JUDGE

Opinion by Judge Cummings

JUDGMENT -- WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 26, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge*

Hon. HARLINGTON WOOD, JR., Circuit Judge

JADAIR, INC., Plaintiff-Appellant	Appeal from the United States District Court for the Eastern District of Wisconsin
No. 81-1380 vs.	
THE WALT KEELER COMPANY, INC., Defendant-Appellee.	No. 79-C-791 Judge Robert W. Warren

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* Circuit Judge Robert A. Sprecher read the briefs, participated in the conference and voted to affirm. However, he died without reviewing this opinion.

This cause came before the Court for decision on the record from the United States District Court for the Eastern District of Wisconsin.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, costs on appeal to appellee, in accordance with the opinion of this Court filed this date.